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ABSTRACT

School finance reform through court action has failed on the federal level and has had mixed success in state courts. State litigation focuses primarily on equal protection provisions and on constitutional working. The 1976 "Serrano v. Priest" decision in California has given the finance reform movement impetus from its assertion that an equal protection clause is in violation if the amount of school district revenue per pupil is a function of the district's wealth rather than that of the state. The countervailing argument centers on the state's objective of local control. Wording of constitutional provisions are often vague and inconsistently applied from state to state. Three states have failed to comply with their constitutional requirements, the precedent set by the 1973 "Robinson v. Cahill" decision in New Jersey. A state's legislative and executive branches--not the courts--are responsible for devising and implementing finance program revisions. Promotion of local control generally will not survive the required constitutional test when education is determined to be a state's fundamental interest. Litigation has drawn attention to finance system inequities, but it should be used in conjunction with other efforts to achieve action by state executive and legislative branches of government. (CJH)

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School Finance Reform Through Litigation: Expressway or Cul-de-sac?

Richard A. Rossmiller

Nearly twenty years have passed since scholars began to seriously suggest that school finance reform might be achieved through legal action. Over fifteen years have passed since the federal court handed down the *McInnis* and *Burris*[1] decisions. In these cases, the plaintiffs argued unsuccessfully that failure to allocate state aid in a manner which permits all children to have equal access to the educational programs constitutes a violation of the fourteenth amendment. The Supreme Court, in *Rodriguez*,[2] held that the equal protection clause of the fourteenth amendment was not violated by a state support program which permitted wide disparities to exist in the amount of revenue per pupil available among the school districts of the state. This decision effectively foreclosed attempts to achieve school finance reform on federal constitutional grounds.

Having failed in the federal courts, advocates of school finance reform turned to the state courts and sought to show that state constitutional provisions were violated by existing state support programs. These efforts were, of course, given considerable impetus by the success achieved in California in the *Serrano*[3] case. The results at the state level have been rather mixed. Existing state support programs have been found unconstitutional in several states. They have been ruled constitutional in several other states, and are still in doubt in states where cases have not yet been decided by the highest court.

Major Legal Arguments

Although the Supreme Court ruled that the equal protection clause of the fourteenth amendment does not prohibit unequal spending among the school districts of a state, the equal protection provisions of state

1. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd*, 394 U.S. 322 (1969); Burriss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).
2. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
3. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

constitutions frequently have been at issue in the state school finance cases. A second major focus in these cases has been on the specific wording of a state's constitutional provisions concerning public education.

Equal Protection Arguments

State school finance cases typically have followed the trail blazed in *Serrano*. They have asserted that an equal protection clause in the state's constitution is violated by a school finance system which makes the amount of revenue per pupil in individual districts a function of the wealth of the district rather than the wealth of the entire state. The major countervailing argument has been centered around the importance of local control, i.e., that local control is a prime objective of state policy and that substantial local responsibility for financing education is necessary to effectuate local control of public education.

Whether or not the local control argument will prevail depends upon whether a court finds that the state constitutional provisions for education create a "fundamental interest" in education, thus subjecting the state's arrangements for providing and financing education to stricter scrutiny than would otherwise be required. In *Serrano*, for example, the California Supreme Court found education to be of fundamental interest for the following reasons:

> First, education is essential in maintaining what several commentators have termed "free enterprise democracy" – that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background.... Second, education is universally relevant.... Third, public education continues over a lengthy period of life – between 10 and 13 years.... Fourth, education is unmatched in the extent to which it molds the personality of the youth of society.... Finally, education is so important that the state has made it compulsory – not only in the requirement of attendance but also by assignment to a particular district and school.[4]

The specific wording of state constitutional provisions also is important. For example, the Washington Constitution (article IX, section 1) declares, "It is the paramount duty of the state to make ample provisions for the education of all children residing within its borders...." The Supreme Court of Washington stated that by "imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a 'duty' that is supreme, preeminent or dominant" and therefore the court concluded, "all children residing within the borders of the state possess a 'right' arising from the constitutional imposed 'duty' of the State, to have the State make ample provision for their education.

4. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

Further, since the 'duty' is characterized as *paramount* the correlative 'right' has equal stature."[5]

Among the states in which education has been ruled to be a fundamental interest are California,[6] Connecticut,[7] Washington,[8] Wyoming,[9] and Arkansas.[10] In general, where state school finance systems have been held unconstitutional, the court has determined that the state constitution's equal protection clause is applicable and thus equal education opportunities must be provided to students throughout the state.

Defendants in state school finance cases typically have asserted that the state's interest in retaining a degree of local control in the field of education provides a rational basis for the state's school financing arrangements. This defense has proven successful in those states where the equal protection provisions of the state constitution have not been held to make education a fundamental interest. If education is not a fundamental interest, then only a rational basis between the objectives of the state and the state's financing arrangements need be shown.

It appears that in recent years courts have become less inclined to rule that education is a fundamental interest. In New York's state school finance case,[11] the Court of Appeals of New York ruled that the rational basis test was the proper standard for review. It noted that stricter scrutiny is appropriate when intentional discrimination against a class of *persons* is claimed, but the claim of discrimination in the case before them was between property-poor and property-wealthy school districts. The court found no authority to support a claim that discrimination between units of local government would call for other than rational basis scrutiny.

The Court of Appeals of Maryland, which ruled that state's school finance system was constitutional, noted that Maryland's constitution either explicitly or implicitly guarantees rights that could in no way be considered fundamental and said:

> The right to an adequate education in Maryland is no more fundamental than the right to personal security, to fire protection, to welfare subsidies, to health care or like governmental services; accordingly, strict scrutiny is not the proper standard of review of the Maryland system of financing its public schools.[12]

The court further noted that even if education were deemed a fundamental right, strict scrutiny would be appropriate only if a significant deprivation of that right occurred.

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5. Seattle School Dist. No. 1 v. State, 585 P2d 71 (Wash. 1978).
6. Serrano v. Priest, 487 P2d 1241 (Cal. 1971).
7. Horton v. Meskill, 376 A.2d 359 (Conn. 1977).
8. Seattle School Dist. No. 1 v. State, 585 P2d 71 (Wash. 1978).
9. Washakie County School Dist. No. 1 v. Herschler, 606 P2d 310 (Wyo. 1980).
10. DuPree v. Alma School Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).
11. Board of Educ. Levittown Union Free School Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).
12. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983).

Among the states in which it has been held that education is not a fundamental interest are Idaho,[13] Oregon,[14] Ohio,[15] New York,[16] Georgia,[17] Colorado,[18] and Maryland.[19] In the absence of a requirement that the strict scrutiny test be applied, the state's interest in maintaining local control has been found to constitute a rational basis for organizing and financing education within a state despite the fact that disparities in per pupil spending exist among the state's school districts.

Constitutional Provisions for Education

A second major source of argument in the state school finance cases has been the wording of state constitutional provisions concerning the establishment of public schools. State constitutional provisions frequently are rather vague. Typically, they require that the state establish a "thorough and efficient" system of public schools, or a "uniform and general" system of schools, or a "complete and uniform system of public instruction." The operational meaning of these terms is not always clear and courts have differed in their interpretation of the meaning of such provisions.

The landmark case in this area is *Robinson v. Cahill*.[20] New Jersey's constitution requires that the legislature establish a "thorough and efficient" educational system. Although the court did not attempt a precise definition of the meaning of "thorough and efficient," it did determine that New Jersey's school finance system was unconstitutional because it failed to provide a thorough and efficient education.

Perhaps the most comprehensive definition of the characteristics of a "thorough and efficient" system of schools was provided by the Supreme Court of Appeals of West Virginia. It stated that a "thorough and efficient" system of schools

> develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.
>
> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own gover-

13. Thompson v. Engelking, 537 P.2d 635 (Idaho 1975).
14. Olsen v. State, 554 P.2d 139 (Or. 1976).
15. Board of Educ. of the City School Dist. of Cincinnati v. Walter, 309 N.E.2d 819 (Ohio 1979).
16. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).
17. McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).
18. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).
19. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983).
20. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

nance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interest in all creative arts, such as music, theater, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and monitor pupil, teacher and administrative competency.[21]

It is important to note that when courts are required to determine the meaning of a phrase such as "thorough and efficient" contained in a state's constitution, they will attempt to determine the intent of the framers of the constitution. The Court of Appeals of Maryland, for example, undertook a detailed review of the history of that state's constitutional provisions concerning public education and concluded that the words "thorough and efficient," considered in historical context, were not the equivalent of "uniform." The court stated:

> Nor do these words impose upon the legislature any directive, in its establishment of the public school system, to so fund and operate it that the same amounts of money must be allocated and spent, per pupil, in every school district in Maryland. To conclude that a "thorough and efficient" system ... means a full, complete and effective educational system throughout the State, as the trial judge held, is not to require a statewide system which provides more than a basic or adequate education to the State's children. The development of the statewide system ... is a matter for legislative determination; at most, the legislature is commanded ... to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education.[22]

The Supreme Court of Colorado has interpreted the "thorough and uniform" requirement of that state's constitution. The plaintiffs argued that this clause requires the state to provide equal educational opportunity to all children. The court disagreed, however, ruling that the constitutional requirement "is satisfied if thorough and uniform educational opportunities are available through state action in each school district ... this constitutional provision does not prevent a local school district from providing additional educational opportunities beyond this standard. In short, the requirement of a 'thorough and uniform system of free public schools' does not require that educational expenditures per pupil in every school district be identical."[23]

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21. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).
22. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983).
23. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

State school finance systems in three states—New Jersey,[24] Washington,[25] and West Virginia[26]—have been ruled unconstitutional for failure to comply with state constitutional requirements. In at least five states—Oregon,[27] Pennsylvania,[28] Ohio,[29] Colorado,[30] and Maryland[31] state support programs have been found to be in compliance with a state constitution requiring a "thorough and efficient" or "thorough and uniform" system of education.

Educational Need

Plaintiffs in both *McInnis*[32] and *Burriss*[33] argued that the educational needs of students should be an important criterion in the allocation of state aid to school districts. The argument was unsuccessful, not because the courts involved were unwilling to recognize that the needs of individual students differ but because of their inability to identify manageable standards which could be used to assess differences in needs and the fiscal implication of such differences. As stated by the court:

> [T]he courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state. We can only see to it that the outlays on one group are not invidiously greater or less than that of another.[34]

Although educational need has not been the central issue in recent state school finance cases, differences in the needs, and the cost associated with meeting these needs, have been among the issues raised. Perhaps the clearest explication of differing educational needs and costs is to be found in the New York school finance case. Several large school districts argued that they suffered from "educational overburden" because a high percentage of their students required more costly educational programs, and that the state school finance program was inequitable because it did not adequately recognize and compensate them for the high cost of educating these students. The trial court found their argument persuasive and ruled that the failure of the state school finance program to take adequate account of these needs and costs violated the

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24. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).
25. Seattle School Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978).
26. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).
27. Olsen v. State, 554 P.2d 139 (Or. 1976).
28. Danson v. Casey, 382 A.2d 1238 (Pa. 1978).
29. Board of Educ. of the City School Dist. of Cincinnati v. Walter, 309 N.E.2d 819 (Ohio 1979).
30. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).
31. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983).
32. McInnis v. Shapiro, 293 F. Supp. 327 (Ill. 1968), *aff'd* 394 US. 322 (1969).
33. Burriss v. Wilkerson, 310 F. Supp. 572 (Va. 1969), *aff'd*, 397 U.S. 44 (1970).
34. *Id.*

equal protection clause of New York's Constitution.[35] The trial court's decision was upheld (in part) by the intermediate court of appeal[36] but reversed by the Court of Appeals of New York.[37] The court of appeals specifically rejected the claim that educational overburden in cities must be remedied by a compensating increase in state aid and said it was beyond the power of the court to determine whether budgets had been divided fairly between competing municipal services, or whether the available funds had been used wisely by local school boards.

Although the issue of educational needs has been raised either explicitly or implicitly in some of the state school finance cases, to date no state school finance program has been declared unconstitutional for failure to consider the varying educational needs of students (and the cost of meeting such needs) in the allocation of state aid to local school districts.

Legal Remedies

It is quite understandable that plaintiffs who have successfully challenged the constitutionality of a state school finance plan may eventually conclude their victory was somewhat hollow. While a court may declare a school finance plan unconstitutional, the court will not devise and impose a new school finance plan. Rather, it is up to the legislative and executive branches of state government to devise and enact a plan which meets the constitutional requirements. In effect, the judicial branch tells the other two branches: "The present plan is unconstitutional. It's up to you to come up with a plan that is constitutional."

The saga of *Robinson v. Cahill* is instructive. In 1973 the New Jersey Supreme Court upheld a trial court decision that New Jersey's school finance system violated the state's constitutional mandate to provide a "thorough and efficient" education.[38] In a supplemental opinion the state was given until December 31, 1974, to bring its school finance program into conformity with the constitutional requirement. This deadline passed without affirmative action. The plaintiffs then returned to the New Jersey Supreme Court requesting equitable relief. In May, 1975, the court ordered provisional relief only for the 1976-77 school year. The court's order provided that in the absence of legislative initiative to reform the state school finance program, "minimal support aid" and "save harmless aid" were to be dispersed in accordance with the incentive equalization formula contained in the 1970 school aid act. In stating its rationale for limited action, the court said:

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35. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 408 N.Y.S.2d 606 (N.Y. App. Div. 1978).

36. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 443 N.Y.S.2d 843 (N.Y. App. Div. 1981).

37. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

38. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

> We do not now go further for several reasons. We continue to be hesitant in our intrusion into the legislative process, forced only so far as demonstrably required to meet the constitutional exigency. As well, it would be premature and inappropriate for the Court at the present posture of this complex matter to undertake, *a priori*, a comprehensive blueprint for "thorough and efficient" education, and seek to impose it upon the other Branches of government. Courts customarily forbear the specification of legislative detail, as distinguished from their obligation to judge the constitutionality thereof, until promulgation by the appropriate authority.... There is no responsible dissent from the view that implementation of the constitutional command is peculiarly a matter for the judgment of the Legislature and the expertise of the Exetutive Department. In other words, the Court's function is to appraise compliance with the Constitution, not to legislate an educational system, at least if that can in any way be avoided.[39]

In January, 1976 the court reviewed a new plan passed by the New Jersey legislature and found it constitutional.[40] The court retained jurisdiction, however, awaiting the funding of the plan by the legislature. When the funding did not materialize, the court briefly closed all New Jersey's public schools during the summer session pending funding of the court-approved or any other constitutional plan. When funding was finally provided, the court dissolved its injunction.[41]

The California Supreme Court in *Serrano II*[42] (affirmed the trial court decision holding the state school finance program unconstitutional) identified several acceptable alternatives for the legislature's consideration. They included (1) full state funding with a statewide property tax; (2) consolidation of California's 1,067 school districts into 500, realigned so as to equalize the assessed valuation in each; (3) retention of present district boundaries, but taxation of all commercial and industrial property at the state level; (4) a district power-equalizing formula insuring that the same tax effort by any two districts would produce the same expenditure per pupil; and (5) an education voucher system. Ironically, it is generally agreed that passage of Proposition 13 did more to equalize school spending in California than any of the legislative actions taken in response to the decision in *Serrano*.

In summary, when the plaintiffs in a school finance case are successful in having the existing program declared unconstitutional, they win the right to go back to the legislative body that adopted the unconstitutional program in the first place and try to convince it to enact a program that meets the constitutional test. The typical response by state legislatures has been to make relatively modest changes in the existing program. The plaintiffs then must return to the courts to determine whether the revised program is constitutional. If the revised program is again ruled

39. Robinson v. Cahill, 339 A.2d 193 (N.J. 1975).
40. Robinson v. Cahill, 355 A.2d 129 (N.J. 1976).
41. Robinson v. Cahill, 358 A.2d 457 (N.J. 1976).
42. Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

unconstitutional, the plantiffs must go back to the legislature and try again. Thus, victory in a school finance case may indeed be a Pyrrhic victory.

Conclusions and Implications

The results of this analysis of state school finance cases leads one to conclude that litigation has not been a notably successful means for achieving school finance reform. Legal action is costly, time-consuming, and generally has been rather ineffective in achieving significant reform in state school finance programs. Even in states where litigation has been successful, the amount of reform achieved has not been startling.

On the other hand, perhaps litigation, or the threat of litigation, may have helped produce school finance reforms that would not otherwise have been possible. One is tempted to observe that legislative bodies are more inclined toward significant reform during the priod of time between when a case is filed and when it is decided. Perhaps this reflects a very human response on the part of legislative bodies. That is, they wish to avoid having a major state program ruled unconstitutional but once such a ruling is handed down, they are likely to "dig in their heels" and make only minimal changes. Thus, it might be good strategy for plaintiffs to delay a decision in a school finance case as long as possible in the hope that state legislative and executive branches will be more amenable to change before the case is decided.

State school finance cases involve interpretation of a state's constitutional provisions and the courts will seek to determine the intent of the framers of the constitution when they used a particular word or phrase. Words such as "thorough and efficient" do not have an identical meaning form one state to another. Their meaning is determined by the intent of the framers of the constitution insofar as that intent can be ascertained. Thus a school finance program which would be constitutional in one state may be ruled unconstitutional in another state.

Equal protection arguments are successful if the plaintiffs are able to persuade the court that the wording of the state constitution gives education a privileged status, that is, that education is a fundamental interest. The state's interest in promoting local control of education generally will not survive the strict scrutiny test required when education is determined to be a fundamental interest. Where education is found not to be a fundamental interest and the rational basis test is applied, the local control argument generally has been persuasive. In state school finance cases decided in recent years there has been a tendency to apply a rational basis rather than a strict scrutiny test and plaintiffs are not likely to be successful when a rational basis test is applied. Educational need has not been accepted as an essential criterion for the distribution of state aid, primarily because the courts have been unable to identify manageable standards for measuring the fiscal implications of such needs.

Clearly, litigation has been neither the expressway to school finance reform, nor has it been a cul-de-sac. Litigation undoubtedly has been useful in drawing attention to disparities and inequities within current systems of school finance. Thus, litigation may be an important factor in securing school finance reform even where the case itself is unsuccessful. Unfortunately, legal action is costly and time-consuming, and may not be as cost-effective as direct political action. This suggests that litigation should be considered a weapon of "last resort" in the struggle for school finance reform and that it should be used in conjunction with other efforts to achieve direct action by the legislative and executive branches of government.